WONG CHU LAI v. WONG HO ENTERPRISE SDN BHD (IN LIQUIDATION) & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
YEW JEN KIE JCA
[CIVIL APPEALS NO: S-02(NCVC)(W)-1893-09-2018 &
S-02(NCVC)(W)-2000-09-2018]
6 JANUARY 2020

COMPANY LAW: *Winding up – Liquidation – Claim against director of company – Director alleged to have carried out business of company to defraud creditors – Whether claim by liquidator barred by res judicata principle – Whether earlier suits by creditors involved liquidators – Whether officers of company personally liable for fraudulent trading in business of company – Whether liquidator established case under ss. 304 & 305 of Companies Act 1965*

The plaintiff was involved in the construction business. Specifically, relevant to the appeals herein, were two construction projects in Sabah. The first was the construction of the Tenom Police Headquarters, a project awarded by the Government of Malaysia to the Koperasi Kesatuan Guru-Guru Malaysia Barat Bhd ('Koperasi'). The Koperasi sub-contracted the project to the plaintiff company which in turn sub-contracted the building and civil works to one Tiong Hoo Teck ('Tiong'). Tiong completed the works but he was not paid in accordance with the agreement and hence, obtained summary judgment against the plaintiff in the High Court ('2005 suit'). The other two defendants in the suit were its directors, Wong Chu Lai ('Wong') and one Ho Ching Yew ('Ho'). Tiong's claim in the 2005 suit was that Wong and Ho had dishonestly, fraudulently, wilfully or negligently represented that the Government had not released progress payments to the plaintiff company. The second construction project was the Ministry of Education project to construct 14 units of teachers' quarters in Tamparuli. Tiong was again appointed by the plaintiff as the sub-contractor. The full payment of the sub-contract sum was not made and hence, Tiong filed another suit ('2006 suit') and the defendants were the plaintiff company and the two directors. Both the 2005 suit and 2006 suit were jointly tried. In respect of the 2005 suit, the claim against Wong and Ho was dismissed on the basis that there was no separate and distinct liability on the part of the defendants to pay Tiong the money owed by the company. The counterclaim by the company for defective works and liquidated ascertained damages was also dismissed. In respect of the 2006 suit, the claim was dismissed on the ground that there was no sub-contract agreement between Tiong and the company. Appeals against the decisions were dismissed by the Court of Appeal. Subsequently, the plaintiff company was wound up. The plaintiff commenced the present

suit for orders against Wong to restore property or monies belonging to the company under ss. 304 and 305 of the Companies Act 1965 ('CA 1965') on account of fraudulent conduct of the defendant in the business of the plaintiff company. The High Court granted partial judgment against the defendant. Hence, the two appeals herein: (i) Appeal No 1893-09-2018 by Wong against the company; and (ii) Appeal No: 2000-09-2018 by the company against Wong. The main issue for determination in these appeals was whether the reliance of the liquidator on ss. 304 and 305 of the CA 1965 prevented the operation of the doctrine of *res judicata*.

Held (dismissing Appeal No 1893-09-2018 and varying High Court order; allowing Appeal No. 2000-09-2018)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Estoppel could not apply to the liquidator in this case. The earlier suits were filed in 2005 and 2006 and the liquidator only came into the picture in 2011 when the plaintiff company was wound up. The earlier suits were filed by Tiong Hoo Teck who later became a creditor of the plaintiff company when it was wound up. Therefore, it could hardly be asserted that the liquidator made any representation or engaged in any conduct which might be the subject of estoppel against him. The liquidator did not bring those actions nor could he have participated in the proceedings in those suits. (para 23)

(2) No estoppel could apply to the liquidator who was expected by law to carry out his statutory functions of ascertaining the debts of the company and its assets and then paying to its true creditors. In doing so, the liquidator was certainly not the privy of the company's creditors. The liquidator's main task was to pursue the liquidation of the company. In the circumstances, the appeal by the plaintiff company in liquidation ought to be allowed. (para 27)

(3) The directors were found to have siphoned off the company's monies by giving themselves loans or advances. They had also paid out monies to related companies. In the end, when the liquidator took over the company, there was nothing much left to pay the creditors. The standard required to establish a claim based on s. 304 of the CA 1965 is on a balance of probabilities. The trial judge had correctly found that the business of the company had been carried out with the intent to defraud its creditors and all the claims by the liquidator had been established. (paras 28-30)

Case(s) referred to:
Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563 CA ***(refd)***
Arnold v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Chin Chee Keong v. Toling Corporation (M) Sdn Bhd [2016] 6 CLJ 666 CA ***(refd)***
Henderson v. Henderson (1843) 3 Hare 100 ***(refd)***
In Re Exchange Securities & Commodities Ltd (In Liquidation) [1988] 1 Ch 46 ***(refd)***
Johnson v. Gore-Wood & Co [2002] 2 AC 1 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors [2014] 1 LNS 281 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 304(1), 305(1)
Courts of Judicature Act 1964, s. 42

(Civil Appeal No: S-02(NCVC)(W)-1893-09-2018)
For the appellant - Ronny Cham; M/s Ronny Cham & Co
For the respondent - Ting Sing Chuan & Jacques Ting Engee; M/s Ting Anuar & Co

(Civil Appeal No: S-02(NCVC)(W)-2000-09-2018)
For the appellant -Ting Sing Chuan & Jacques Ting Engee; M/s Ting Anuar & Co
For the respondent - Ronny Cham; M/s Ronny Cham & Co

[Editor's note: Appeal from High Court, Kota Kinabalu; Civil Suit No: BKI-22NCVC-69-6-2016 (HCI) (affirmed in part).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] There are two appeals before us. They arise from the decision of the Kota Kinabalu High Court dated 24 August 2018. The plaintiff company had brought an action against one of its directors, the defendant. The plaintiff was applying for orders against the defendant to restore property or monies belonging to the company under ss. 304 and 305 of the then Companies Act 1965 ("CA 1965") on account of the fraudulent conduct of the defendant in the business of the plaintiff company. At the end of the trial, partial judgment was granted against the defendant together with interest and costs.

[2] Both the plaintiff and the defendant were aggrieved with the decision of the High Court below. They each filed separate appeals contending that the High Court was plainly wrong in arriving at the said decision.

[3] After careful consideration of the written submissions filed by all parties and after hearing oral arguments, we unanimously allowed the appeal of the plaintiff in the High Court and dismissed the appeal by the defendant there. We now provide the reasons for so doing which will form the judgment of this court. For convenience, the parties will be referred to as they were in the High Court or by their abbreviations.

A **Background Facts**

[4] In view of the issues raised in the instant appeals, it is necessary to set out the relevant background facts. The learned judge below has carefully set out these facts in some detail and we would restate them as follows. The plaintiff is now a company in liquidation. It was wound up in August 2011. The liquidator of the company brought this action against one of its directors, the defendant. The other director was not made a defendant as he had been earlier adjudged a bankrupt.

[5] Prior to its liquidation, the company was involved in the construction business. Specifically relevant to the present appeals, it was involved in two construction projects in Sabah. The first was the construction of the Tenom Police Headquarters. It was a project awarded by the Government of Malaysia to the Koperasi Kesatuan Guru-Guru Malaysia Barat Berhad ("Koperasi").

[6] The Koperasi sub-contracted the project to the plaintiff company which in turn sub-contracted the building and civil works to one Tiong Hoo Teck under an agreement dated 12 May 2003 for the sum of RM10 million. Tiong Hoo Teck completed the works in question but he was not paid in accordance with the agreement. He obtained summary judgment against the plaintiff in Kota Kinabalu High Court Suit No. K22-194 of 2005 ("the 2005 suit") in the sum of RM2,123,056.15 together with interest of 8% per annum. The other two defendants in the said suit were its directors, ie, Wong Chu Lai (the defendant here) and one Ho Ching Yew. The defendants there had also filed a counterclaim against the plaintiff for defective works.

[7] Tiong Hoo Teck's claim in the 2005 suit was that Wong Chu Lai and Ho Ching Yew had dishonestly, fraudulently, wilfully or negligently represented that the Government had not released progress payments to the plaintiff company Wong Ho Enterprise Sdn Bhd. On that basis, Tiong Hoo Teck claimed that he did not receive all the payments under the subcontract.

[8] The other construction project was the Ministry of Education project to construct 14 units of teachers' quarters in Tamparuli. Tiong Hoo Teck was again appointed by the plaintiff company as the sub-contractor. The total sub-contract sum was RM2,123,086.10. Full payment was not made. Tiong Hoo Teck filed another suit, the Kota Kinabalu High Court suit K22-2-2006 ("the 2006 suit") for the balance sum of RM333,086.10. The defendants were against the plaintiff company and the same two directors.

[9] Both the 2005 suit and the 2006 suit were jointly tried by Justice Stephen Chung. In respect of the 2005 suit, the learned judge dismissed the claim against the second and third defendants there (Wong Chu Lai and Ho Ching Yew respectively) on the basis that there was no separate and distinct liability on the part of the defendants to pay Tiong Hoo Teck the money that

was owed by Wong Ho Enterprise Sdn Bhd. The learned judge also dismissed the counterclaim of the first defendant there (Wong Ho Enterprise Sdn Bhd) for defective works and liquidated ascertained damages.

[10] In respect of the 2006 suit, the learned judge dismissed the claim on the main ground that there was no sub-contract agreement between Tiong Hoo Teck and Wong Ho Enterprise Sdn Bhd. The agreement was with a firm known as Wong Ho Construction Enterprise. The learned judge also found that there was no evidence to pierce the corporate veil. Appeals against these decisions were dismissed by this court (see *Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors* [2014] 1 LNS 281; [2014] 4 MLJ 405).

[11] Not long thereafter, the plaintiff company was wound up on 2 August 2011. The liquidator commenced the present suit in 2016 against the sole defendant claiming that the defendant had carried out the business of the plaintiff company to defraud creditors within the meaning of s. 304 of the CA 1965. The plaintiff company in liquidation claimed for the same sum of RM2,123,056.15 which was earlier granted in the summary judgment in the 2005 suit. The company also claimed for the retention sum of RM500,000 which was not pursued earlier in the 2005 suit as it was not due yet since the defect liability period had not expired. Despite demands, this sum was not paid to Tiong Hoo Teck.

Decision Of The High Court

[12] A key argument in the court below was whether the defendant had breached the provisions of s. 304 of the CA 1965 and, even if so, whether the claims filed by the liquidator were barred by the *res judicata* principle as Justice Stephen Chung, in the 2005 and 2006 suits, had refused to lift the corporate veil against the directors of the company.

[13] In this respect, the learned judge in the court below came to the following conclusion (at paras. 51 and 52 of the grounds of decision):

> [51] The main remedy sought in the 2005 suit against the defendant was the sum of RM2,123,056.15 that was due from the company to Tiong Hoo Teck. As I noted earlier, this is the principal remedy sought in this case. The declarations sought are merely ancillary orders sought under section 304 to pin liability on the defendant. Thus, apart from the retention sum that was not due at the time of the 2005 suit, the basis of the claim against the defendant is the same.
>
> [52] As for the parties in question in this action and the 2005 suit, the liquidator who is pursuing this action was appointed after the company was wound up. It is obvious that the remedy is for the benefit of the estate of Tiong Hoo Teck that is still pursuing the fruits of judgment that had been obtained against Wong Ho Enterprise Sdn Bhd. I therefore find that the claim is clearly barred by the doctrine of *res judicata*. Otherwise, any litigant who fails in an action under similar circumstances would be

A in a position to vex the defendant twice by invoking section 304 of the Companies Act 1965 and by relying on the same material that had been used earlier. Even if the liquidator of Wong Ho Enterprise Sdn Bhd now has additional evidence, the claim herein is a matter that clearly belonged to the earlier 2005 action and thus, the claim comes within the wider principle of *res judicata*.

B

[14] In respect of the claim for the retention sum, however, the learned judge was not persuaded by the *res judicata* argument. This was how he put it (at para. 55 of the grounds of decision):

[55] As the retention sum was not due at the time of the 2005 suit, in
C my opinion, it is not a claim that belonged to the said action. Therefore, it is not barred by the doctrine of *res judicata*. Counsel for defendant submitted that the retention sum was struck out from the earlier claim, i.e. it was removed from the attachment to the Statement of Claim (Attachment B) and therefore the claim had been abandoned. However, I am of the view that it cannot be a claim that "belonged" to the 2005
D Suit in the first place as it was not due. In the premises, the failure of Tiong Hoo Teck to pursue it earlier cannot be a bar to do so now. Therefore, the argument of counsel for the defendant that the retention sum claim is barred by the doctrine of *res judicata* is without merit.

[15] And the learned judge then came to the following conclusion
E (at para. 60):

[60] Although, the defendant claimed that he did not file the final Statement of Affairs because the company books were taken away by the liquidator, it is apparent from the last audited accounts that the directors had siphoned off the company's monies by giving themselves loans or
F advances. They had also paid out monies to related companies as stated by the PW1. The directors should have known the retention sum is akin to trust monies as it must be paid to the subcontractor at the end of the defect liability period if there were no defects. But by the time the liquidator took over the company, there was nothing much left to pay to the creditors. Thus, I find on a balance of probabilities that the business
G of the company had been carried on with intent to defraud its creditors.

[16] As a consequence, the learned Judge dismissed the claims on the earlier sums under the 2005 Suit but allowed judgment to be entered for the plaintiff for the retention sum of RM500,000.00. The defendant was ordered to pay the said sum to the estate of Tiong Hoo Teck, together with interest and costs.

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Our Analysis And Findings

[16] Before us, much of the same arguments were canvassed by each side to show that the learned judge had arrived at an erroneous finding. The liquidator was, of course, aggrieved with the decision of upholding the
I *res judicata* argument. The defendant, on the other hand, was displeased with the High Court's decision to allow the claim for the retention sum.

[17] In our view, the main issue for determination in the appeals was whether the reliance of the liquidator on ss. 304 and 305 of the CA 1965 prevents the operation of the doctrine of *res judicata*. After careful consideration of the arguments put forward by both parties, we came to the conclusion that *res judicata* did not apply to the claims by the liquidator. We considered that the learned judge fell into error in not allowing the liquidator's claim in full. Our reasons were as follows.

[18] It may be useful to begin by looking at the statutory provisions relied upon by the liquidator to seek his remedy. First, s. 304(1) of the CA 1965 which reads as follows:

> 304. Responsibility for fraudulent trading
>
> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[19] And s. 305(1) of the CA 1965 reads:

> Power of Court to assess damages against delinquent officers, etc.
>
> (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any past or present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that person, liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

[20] It is not in doubt that the purpose of the aforesaid provisions is to make the officers of the company personally liable for fraudulent trading in the business of the company especially in the case where such officers, who are usually the directing minds of the company, do so for the purpose of defrauding the creditors of the company. It may be immediately apparent that these provisions provide an exception to both the separate legal personality principle of the company as well as the principle of limited liability. So, apart from the common law, there can also be recourse to these statutory provisions to lift the corporate veil so that remedies can be

provided to especially creditors of the company (see *Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563 and *Chin Chee Keong v. Toling Corporation (M) Sdn Bhd* [2016] 6 CLJ 666; [2016] 3 MLJ 479).

[21] On a plain reading there is no doubt that a liquidator can apply for the remedy provided in those provisions. The only question in the context of the present appeals is whether the liquidator here was estopped from so doing by the plea of *res judicata* by reason of the decisions in the earlier suits and in particular the decisions that were made to refuse the lifting of the corporate veil against the defendant.

[22] It is trite that the rationale for the plea of *res judicata* or estoppel is that a party ought not to be unnecessarily harassed by multiple proceedings on the same issue. It is in the public interest that there should be finality in litigation and that parties should not be twice vexed in the same matter (see *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; *Henderson v. Henderson* (1843) 3 Hare 100; *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 and *Johnson v. Gore-Wood & Co* [2002] 2 AC 1).

[23] In our respectful view, however, we did not think any estoppel could apply to the liquidator here. The earlier suits were filed in 2005 and 2006 and the liquidator here only came into the picture in 2011 when the plaintiff company was wound up. The earlier suits were filed by Tiong Hoo Teck who later became a creditor of the plaintiff company when it was wound up. So, it can hardly be asserted that the liquidator made any representation or engaged in any conduct which might be the subject of estoppel against him. The liquidator did not bring those actions nor could he have participated in the proceedings in those suits.

[24] It was also significant that Tiong Hoo Teck was then pursuing recovery of a personal debt. The liquidator here is pursuing the liquidation of the company. In carrying out his duty, the liquidator must be entitled to pursue the full exercise of any statutory power available to him whether under the CA 1965 or elsewhere. So, in our view, no estoppel can operate against the liquidator exercising such lawful power.

[25] In any case, it is trite law that it is not open ever to set up an estoppel against a statute. To allow estoppel to operate would tantamount to a contravention of statutory provisions. In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1988] 1 MLJ 393, the Federal Court reiterated the principle that no estoppel can operate against statute. In a supporting judgment, Gopal Sri Ram JCA (as he then was) observed (at the headnotes) that "... it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law ... and the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such a circumstance".

[26] Furthermore, it is not insignificant to observe that the liquidator is not bound by the prior actions of the company or its creditors. Of relevance is the case of *In Re Exchange Securities & Commodities Ltd (In Liquidation)* [1988] 1 Ch 46. It was a case about estoppel by representation but the broad principles also apply to *res judicata* as well. In this respect, Harman J observed (at p. 59):

> As it seems to me, James LJ's observations must apply to estoppels as well as to judgments, remembering, of course, that judgments raise estoppels *per rem judicatum* and that they are said to be conclusive in that way. They are not conclusive, it is clear beyond any doubt, in bankruptcy nor are they in liquidations of companies, as Mr. Stewart conceded. It seems to me that the logic in that is inexorably what Mr. Joffe asserted - that is, that estoppels are not conclusive in liquidations or in bankruptcies either. The reason in all cases is the same, that the person sought to be estopped is not the person who made the representation and is therefore not bound by it; that is that the trustee or liquidator is not the person who suffered the judgment or made the representations and is not the person who gave the covenant, to use the instances from the other earlier cases. Thus in all these cases there is nothing which binds the liquidator or trustee in bankruptcy.

[27] For all the above-mentioned reasons, it was unfortunate that the learned judge came to the conclusion that *res judicata* applied to the subject matter in the 2005 and 2006 suits. In our judgment, no estoppel can apply to the liquidator who was expected by law to carry out his statutory functions of ascertaining the debts of the company and its assets and then paying to its true creditors. In doing so, the liquidator was certainly not the privy of the company's creditors as the learned judge seemed to think. The liquidator's main task, as we noted earlier, was to pursue the liquidation of the company. In the circumstances, the appeal by the plaintiff company in liquidation ought to be allowed.

[28] The next question which concerned the appeals was whether a case under ss. 304 and 305 CA 1965 had been established by the liquidator. In this context, we noted that the learned judge had meticulously gone through the evidence as set in his grounds of decision and had then come to the conclusion that the directors had siphoned off the company's monies by giving themselves loans or advances. They had also paid out monies to related companies as testified by PW1. In the end, when the liquidator took over the company, there was nothing much left to pay the creditors.

[29] The learned judge also correctly noted that when Justice Stephen Chung decided on the 2005 and 2006 suits, the burden of proof of establishing fraud was the beyond reasonable doubt standard. With the Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, the applicable standard is now the civil standard. So, the standard now required to establish a claim based on s. 304 of the CA 1965 is on a balance of probabilities.

[30] Considering the matter in its entirety, we were in full agreement with the learned judge that the business of the company had been carried out with the intent to defraud its creditors. Accordingly, we found no error on the part of the learned judge in this respect and we considered that all the claims by the liquidator had been established.

Conclusion/Orders

[31] In the circumstances, and for the reasons we have provided, we dismissed the appeal of the defendant/appellant in Appeal No 1893-09-2018. We however varied the order of the High Court in that the sum of RM500,000 as the retention sum should be paid to the liquidator instead of the estate of Tiong Hoo Teck. We considered that it would be inappropriate to order monies to be paid to a non-party which did not participate in the proceedings. It would be up to the liquidator to pay the creditors according to priority.

[32] As for Appeal No. 2000-09-2018, we allowed the appeal of the liquidator/appellant and ordered judgment for all the sums claimed by the liquidator. We also ordered the defendant to pay costs of RM15,000 to the liquidator for each appeal subject to allocatur.

[33] Finally, we should also record that since the decision of this court on 25 July 2019, our learned sister Yew Jen Kie CJA has retired. This judgment is therefore prepared in accordance with s. 42 of the Courts of Judicature Act 1964.